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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1407

CARL PERLA, SR., *Petitioner.*

v.

STATE OF NEW YORK and
LOUIS J. LEFKOWITZ, as Attorney General
of the State of New York

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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May 24, 1968

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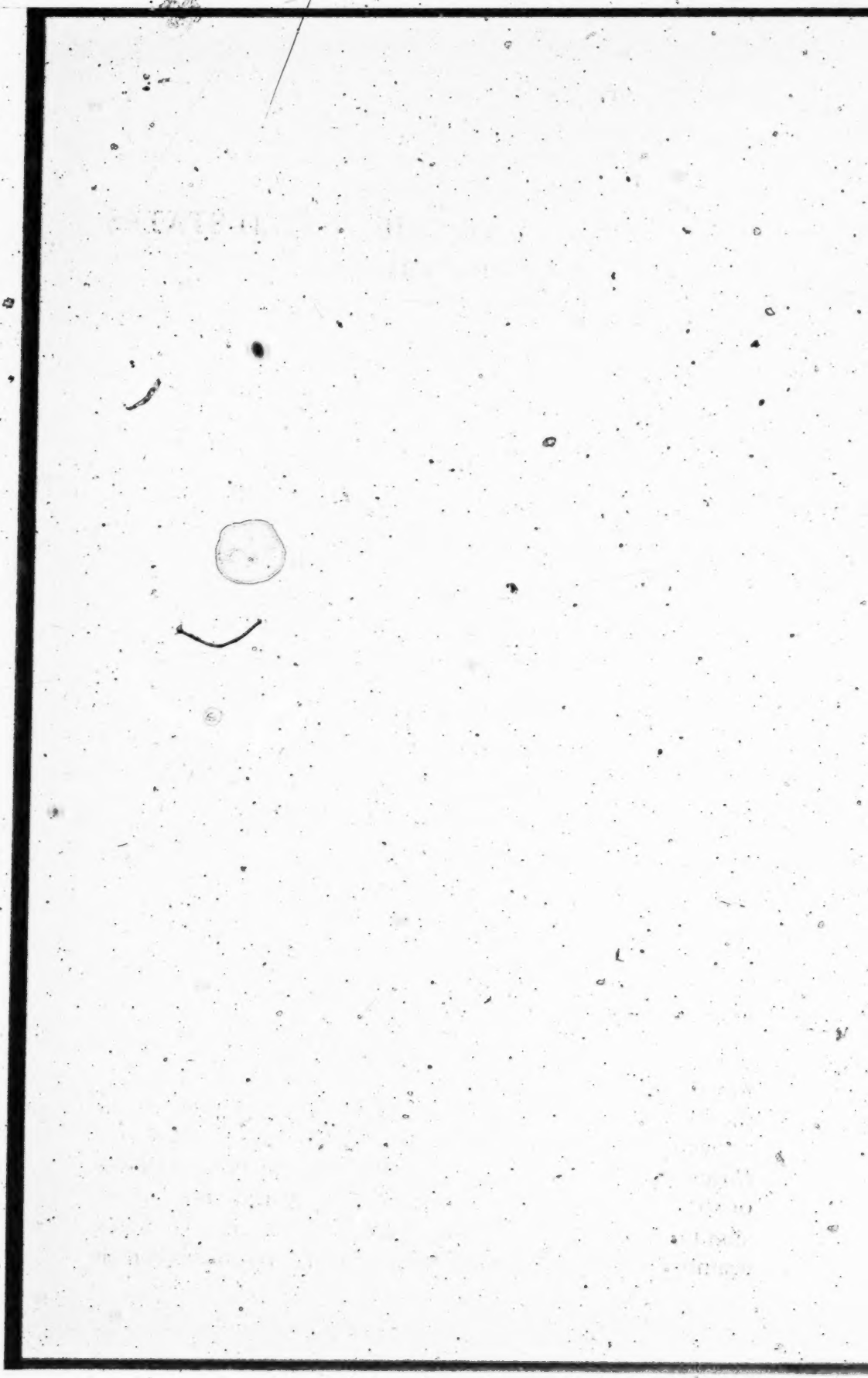

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In response and reply to the Respondents' Brief in Opposition, the Petitioner states as follows:

1. Respondents' assertion that the due process contention was not urged in the court below misconceives the thrust of the Fifth Amendment privilege and Petitioner's contentions respecting that privilege. This Court's decision in *Malloy v. Hogan*, 378 U.S. 1, 8, made plain that the Due Process Clause of the Fourteenth Amendment "secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain

silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence." In other words, all assertions concerning a state violation of the privilege against self-incrimination necessarily arise under the Due Process Clause of the Fourteenth Amendment.

Moreover, this due process umbrella over the privilege encompasses the guarantee that the individual shall "suffer no penalty . . . for such silence," *Malloy v. Hogan, supra*, 8. And when the Petitioner urged in his brief before the New York Court of Appeals (pp. 22-23) that Art. I, Sec. 6, of the New York Constitution is constitutionally infirm in that it automatically disbars one from public office for refusing to sign a waiver, without any required finding "that this is some way impaired his capacity to function in that office" (p. 23), the Petitioner was protesting one of the due process infirmities of Art. I, Sec. 6. He was protesting the penalty imposed by that provision, i.e., summary dismissal and disqualification, which in this instance was being effectuated by summary judgment procedure in a suit instituted under Art. I, Sec. 6, by the state attorney general.

Thus the Petitioner, by his attack on the summary dismissal aspect of Art. I, Sec. 6, effectively raised the Due Process Clause issue. While he did not on the record protest the summary judgment procedure *per se* in due process terms,[1] the protest against the summary dismissal aspect of the New York constitutional provision effectively and necessarily

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[1] Petitioner had no reason to believe, from prior decisions of the New York Court of Appeals, that summary judgment procedure would be permitted to effectuate summary dismissal of a public officer. In light of *Slochower v. Board of Education*, 350 U.S. 551, Petitioner had every reason to believe that the New York Court of Appeals, even if it believed that Petitioner could be dismissed for refusing to sign a waiver, would not permit the dismissal to occur summarily through the judicial process. In that sense, Petitioner was the victim of a "surprise" decision.

included that means of achieving summary dismissal. And the New York Court of Appeals, with full awareness of Petitioner's contentions and of its own direction to dismiss Petitioner from office forthwith, gave its sanction to such summary dismissal. When it could find no "inescapable conflict with the Fifth Amendment," the court was necessarily denying all of the due process considerations which emanate from a summary dismissal or penalty based on an invocation of the Fifth Amendment privilege.

2. Respondents' contention (Brief in Opposition, p. 3) that *Slochower* is distinguishable since Slochower was entitled to tenure, whereas Petitioner was subject to removal at the pleasure of the mayor, is without merit. In this case, the mayor declined to remove Petitioner and the state attorney general is not empowered to remove on behalf of the mayor. And the effort of the state attorney general to remove Petitioner summarily by legal action can rise to no greater constitutional level than the effort of the Board of Education to remove Professor Slochower summarily. To state that Petitioner has no tenure or no constitutional right to his public office is not the equivalent of stating that he has no protection against summary removal or penalty for having invoked a constitutional privilege.

3. Finally, Respondents' Brief in Opposition (pp. 4-8) argues that Art. I, Sec. 6, does not violate the Fifth Amendment—as incorporated in the Due Process Clause of the Fourteenth Amendment—since a majority of this Court has already "upheld the validity of the sanction of discharge from public employment" (p. 7). That argument, derived from certain statements in the various opinions in *Garrity* and *Spevack*, is a treacherous one in view of the fact that neither *Garrity* nor *Spevack* decided the issue of discharge. More importantly, the issue is indeed involved in the pending case of *Gardner v. Broderick*, No. 638, Oct. Term 1967, and related pending cases, a fact which Respondents have ignored and which makes it appropriate to withhold action on the instant petition until the Court has spoken in those pending cases. See petition, pp. 10-11.

CONCLUSION

For these reasons, supplementing those in the petition, a writ of certiorari should issue to review the judgment below after this Court has acted on the aforementioned pending cases.

Respectfully submitted,

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